

Service Date: November 2, 2000

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF MONTANA POWER)	UTILITY DIVISION
COMPANY, Complaint by BOZEMAN)	
SCHOOL DISTRICT, et al., Regarding)	DOCKET NO. D2000.9.140
Return to Utility Service)	
)	ORDER NO. 6287

PROPOSED ORDER

Note: This order is a proposed order. Each party has the opportunity to file objections with supporting argument (i.e., briefs) prior to a PSC final order. Objections and supporting arguments must be filed and served within 20 days of the service date of this proposed order. Arguments opposing exceptions must be filed and served within 10 days thereafter.

Introduction

1. On September 1, 2000, the Bozeman School District, et al. (District), filed before the Public Service Commission (PSC) a complaint against Montana Power Company (MPC). The District's complaint is directed at an MPC decision to not allow a certain category of MPC natural gas transportation customers to return to MPC as gas sales customers. The category denied return by MPC is comprised of customers who: (a) at one time were able to establish that they used greater than 5,000 dkt gas per year and therefore qualified for choice of competitive suppliers on MPC's system; (b) did then choose a competitive supplier, obtaining whatever benefits of choice were available at that time; and (c) now, for various reasons, can establish that they use less than 5,000 dkt gas per year. The District is within this category of MPC customers and has been denied return to MPC as a full-service, sales customer.

2. On October 12, 2000 (fax), MPC filed a motion to dismiss the District's complaint. In its motion MPC argues that the District has entered a contract with MPC pertaining to the District's gas transportation needs, the contract governs the rights and obligations regarding the service obtained by the District, the PSC does not have jurisdiction over

contracts, and dismissal by the PSC is therefore appropriate. MPC points out that the contract with the District specifically provides that the District cannot return to sales service after the first year of transportation service, which has come and gone without a District request to return.

3. On October 16, 2000, the District filed a combined response to MPC's motion to dismiss and a motion for summary judgment. In response to MPC's motion the District argues that it is not seeking a PSC declaration on the validity of a contract, it is seeking PSC enforcement of a PSC-approved stipulation, without which MPC could not have made a contract and with which any MPC contract must comply. In regard to summary judgment the District argues that there are no genuine issues of material fact, as a matter of law the District is entitled to return to MPC sales service, and summary judgment by the PSC is therefore appropriate.

4. The District's position in its complaint and on summary judgment is based on a stipulation approved by the PSC during MPC's natural gas utility restructuring. *See, PSC Docket No. D96.2.22*. The District argues that, because it presently uses less than 5,000 dkt gas per year, it qualifies to return to MPC as a full-service, sales customer under a provision within Stipulation #2, approved by the PSC in that proceeding. *See, id., Order No. 5898d, Appendix 2, October 31, 1997*. Stipulation #2 establishes 5,000 dkt per year gas consumption as the threshold usage level to qualify for MPC transportation service and, in the District's view, establishes that customers falling below that threshold may return to MPC as full service sales customers at any time.

Discussion

5. MPC's motion to dismiss raises a threshold question of PSC jurisdiction over contract matters. When PSC jurisdiction over contracts is challenged, § 69-3-103, MCA, is commonly referenced. It provides that the PSC does not have judicial powers. The PSC determines that the provision most probably means "inherent judicial powers," such as the inherent powers courts have over all claims in law and equity. *See, Art. VII, § 4, Mont. Const.* The PSC does not have that broad, inherent judicial power. However, the PSC exercises numerous powers, generally referred to as "quasi-judicial" powers, which are indistinguishable from powers the judiciary exercises, and does so lawfully so long as the PSC has been enabled by

the legislature to exercise those powers. These PSC powers do extend to contracts under certain circumstances.

6. Contracts may be subject to state regulatory powers, and the PSC, having authority over rates and services of public utilities, may have the power to supersede or modify contracts made by public utilities to the extent that such rates and services are affected. *City of Billings v. PSC*, 193 Mont. 358, 370, 631 P.2d 1295, 1303 (1981). The PSC determines that there is at least one situation where "rates and services are affected," within the meaning that terminology in *City of Billings*, and that is where an issue is raised regarding whether a public utility has contracted to provide services at rates, terms, or conditions other than those approved by the PSC. The PSC is "enabled" (i.e., has the power) to hear and decide such matters because the PSC administers applicable statutes, including § 69-3-305, MCA, which preclude a public utility from deviating from PSC-approved rates and services. Because the District's complaint centers on the question of whether MPC is deviating from rates or terms and conditions approved by the PSC, the PSC has jurisdiction over the MPC / District contract.

7. In regard to the District's motion for summary judgment, the PSC can grant summary judgment when there are no genuine issues of material fact. Summary judgment, regardless of who requests it, may be granted in favor of the movant or in favor of the opposing party. The PSC determines that the following "facts" are unlikely to be disputed and are sufficient to support a PSC ruling through summary judgment:

a. MPC was a party in PSC Docket No. D96.2.22, MPC's gas utility restructuring case. In that docket Stipulation #2 was agreed to by certain parties, including MPC. In that docket Stipulation #2 was approved by the PSC, through PSC Order No. 5898d, October 31, 1997. Stipulation #2 is part of an order of the PSC and is binding on MPC.

b. Stipulation #2 includes provisions allowing certain MPC gas customers who, at the time of the stipulation, were MPC full-service gas customers, to choose to be MPC gas transportation customers and obtain the commodity (i.e., the gas itself) from the competitive market.

c. The District, being able at the appropriate time to demonstrate that it qualified for gas transportation services by MPC, because it used 5,000 dkt or more natural gas annually, became an MPC transportation-service customer. At the time of becoming an MPC transportation customer the District signed a contract with MPC, a provision of which allows return at the end of the first year of transportation, but precludes return to MPC as a full service customer after the end of the first year of transportation service.

d. The District did not request a return to MPC at the end of the first year of transportation service and has remained and presently is an MPC transportation customer. The District can demonstrate that it presently uses less than 5,000 dkt natural gas per year. The District has requested that MPC allow it to return to MPC as a full service customer. MPC has denied the request.

8. Stipulation #2, in a section entitled "Threshold Level," establishes that customers with annual gas consumption exceeding 5,000 dkt have the opportunity to purchase gas from competitive suppliers and contract with MPC for distribution, transportation, and storage services. *See, PSC Order No. 5898d, Appendix 2, p. 3, para. 1.* Then, in a section entitled "Provider of Last Resort," the stipulation establishes that at the end of the first year of obtaining supplies competitively the customers could return to MPC following proper notice, but after the end of the first year customers not exercising that return option could no longer return. *Id., p 5., para. 3.* The stipulation also includes a statement that "[c]ustomers using less than 5,000 [dkt] annually will also be allowed to return to sales service" under conditions that "will be addressed in later discussions on residential aggregation." *Id.* The District argues that, because it presently uses less than 5,000 dkt gas per year, it qualifies to return to MPC as a full-service, sales customer under this provision.

9. The PSC determines that in context of MPC gas restructuring, customers who have once been designated "customers with annual consumption exceeding 5,000 dkt" (or the equivalent) for any purpose related to Stipulation #2 must remain so designated for other purposes of that stipulation. There is no legal justification for a conclusion to the contrary (e.g., that customer rights under the stipulation might be governed by the particular annual-usage

category the customer is in at the time a right is asserted). Stipulation #2 does not contemplate that there would be customers who might move above and below the 5,000 dkt per year usage threshold. The stipulation clearly does not give MPC a right to require a customer falling below the 5,000 dkt threshold to return to full service. The stipulation does not give customers rights to require MPC to allow a return to full services at any time. Once a customer has designated itself as being within a category, that category is fixed. Both the stipulation and the MPC / District contract provide that return must be at the end of the first year of transportation. The contract is in accord with the stipulation in this regard.

10. The provider-of-last-resort provision pertaining to customers using less than 5,000 dkt gas per year appears to be either misplaced or merely inserted as an assurance pertaining to core aggregation or residential aggregation (aspects of MPC restructuring which were then to be considered in the future, and eventually were, in MPC's gas pilot program, *PSC Docket No. D98.2.28*, through MPC tariff provisions such as termination provisions in MPC's AGTC-1, 12, or service agreements in MPC's AGTC-1, 18). In any event the less-than-5000 dkt provision is not applicable in any way supporting the District's claim because there is nothing in balance of the provider-of-last-resort provision that pertains at all to choice in customers using less than 5000 dkt per year. The PSC determines that whatever the less-than-5000 dkt return provision was intended to address, it is not addressing the greater-than-5000 dkt customers that were able to shift to transportation and now want to return to full service.

Order

For the reasons expressed above the PSC hereby denies MPC's motion to dismiss. However, for the reasons expressed above, the PSC hereby grants summary judgment in favor of MPC and orders that the Bozeman School District, et al., complaint against MPC is dismissed

Done and dated this 25 day of October, 2000, by a vote of 4-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chair

BOB ANDERSON, Commissioner

GARY FELAND, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

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